In the
Supreme Court of the United States

OCTOBER TERM 1971

No. 71-829

LEILA MOURNING, *Petitioner*

v.

FAMILY PUBLICATIONS SERVICE, INC., *Respondent*

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The National Conference of Commissioners on Uniform State Laws hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of James Nabrit, Esquire, attorney of record for Petitioner, has been obtained. The consent of Robert S. Rifkind, Esquire, attorney for Respondent, was requested but refused.

The interest of the National Conference in this case arises from the fact that the Uniform Consumer Credit Code (UCCC), which the Conference drafted to be in harmony with the Truth in Lending Act (15 U.S.C. §§ 1601 et. seq.), applies to all consumer credit transactions in which,

inter alia, either a finance charge is imposed or the debt is paid in multiple instalments (UCCC §§ 2.104 and 3.104). Moreover, UCCC §§ 1.301 and 3.301 provide that compliance with Truth in Lending is the equivalent of compliance with the UCCC. The Board of Governors of the Federal Reserve System is directed to exempt from the applicability of Truth in Lending those states having laws substantially similar, and the Board has considered the UCCC disclosure provisions to be sufficiently similar to those of Truth in Lending to merit exemption. (15 U.S.C. § 1633) If the Fifth Circuit's rejection of the validity of the more-than-four-instalments rule of Regulation Z (12 C.F.R. § 226.2(k)) is allowed to stand, grave uncertainties arise concerning: (1) the status of the disclosure provisions of the UCCC as being sufficiently similar to those of Truth in Lending to qualify for exemption; and (2) whether in UCCC states creditors not separately stating a finance charge in multiple instalment cases need any longer comply with the disclosure provisions of the UCCC owing to UCCC §§ 2.301 and 3.301. The National Conference believes that clarification of the status of the more-than-four-instalment rule is necessary at the highest judicial level in order that the Conference can continue its cooperation with the Board in providing American consumers with a uniform law of credit disclosure.

Respectfully submitted,

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I. STATEMENT OF THE CASE

This brief is submitted by the National Conference of Commissioners on Uniform State Laws as *amicus curiae* in support of the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The interest of *Amicus* in this case is fully set forth in its attached Motion for leave to file this brief. The discussion which follows is confined to the issue of the validity of the more-than-four-payments rule of Regulation Z (12

C.F.R. § 226.2(k)) as a proper exercise of the authority of the Board of Governors of the Federal Reserve System to prescribe regulations to carry out the purposes of the Truth in Lending Act (15 U.S.C. § 1604).

The suit arose from a contract entered into between petitioner and respondent under which petitioner was to receive four magazines for 60 months in exchange for an initial payment of $3.95 and 30 monthly payments of $3.95. Respondent made none of the disclosures specified in the Truth in Lending Act (15 U.S.C. §§ 1601 et seq.) and Regulation Z (12 C.F.R. § 226). The District Court held that since the contract was payable in more than four installments, it was a consumer credit transaction subject to the Act and that disclosures should have been made. The Fifth Circuit reversed and remanded with directions that the complaint be dismissed on the ground that the more-than-four-payments rule of 12 C.F.R. § 226.2(k) was unconstitutional as in excess of the authority granted the Board of Governors of the Federal Reserve System to prescribe regulations implementing the Truth in Lending Act (15 U.S.C. § 1604). *Mourning v. Family Publications Service, Inc.*, 449 F.2d 235, CCH Consumer Credit Guide ¶ 99,337 (5th Cir. 1971), *rev'g* CCH Consumer Credit Guide ¶ 99,632 (S.D. Fla. 1970).

II. ARGUMENT

A. The Decision Below Raises an Important Issue of First Impression Affecting Innumerable Credit Transactions.

The Fifth Circuit's opinion in this case withdraws the substantial protections of the Truth in Lending Act (hereafter referred to as the Act) (15 U.S.C. § 1601 et seq.), from consumers in all transactions in which creditors do

not choose to state separately a finance charge. It is a fair assumption that in the bulk of consumer credit transactions today a finance charge is separately stated but that in a substantial segment of the consumer credit market the cost of credit is included in the sale price (credit jewelers, clothiers, land sales, leases, and the like) and is not separately disclosed.[1] The Congressional mandate to the Board of Governors of the Federal Reserve System is to "prescribe regulations to carry out the purposes of" the Act (15 U.S.C. § 1604) and the purpose of the Act is declared to be that of assuring consumers "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various *credit terms* available to him and to avoid the uninformed use of credit." (Emphasis added).

In implementation of this charge, the Board prescribed regulations requiring a statement of the terms of credit not only by those creditors who choose to state a separate finance charge but also by creditors who make no separate statement of a finance charge but who engage in credit transactions involving a substantial period of credit extension, i.e., where by agreement the contract is payable in more than four installments. (12 C.F.R. § 226.2(k)). By adoption of the more-than-four-installments rule the Board

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[1] *See* Johnson, *The Uniform Consumer Credit Code and the Credit Problems of the Low Income Consumers*, 37 GEO. WASH. L. REV. 1117, 1119 (1969); Jones, *The Inner City Marketplace: The Need For Law and Order*, 37 GEO. WASH. L. REV. 1015 (1969); Jordan and Warren, *Disclosure of Finance Charges: A Rationale*, 64 MICH. L. REV. 1285, 1301 (1966); Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. REV. 1, 6-7 (1969); Lynch, *Consumer Credit at Ten Percent Simple: The Arkansas Case*, U. OF ILL. L.F. 592, 606 (1968); Spanogle, *How Much Truth in What Kinds of Lending*, 16 J. PUB. L. 296, 303 n.27 (1967); White, *Consumer Credit in the Ghetto: UCCC Free Entry Provisions and the Federal Trade Commission Study*, 25 BUS. LAW. 147 (1969); Comment, *Consumer Protection in Michigan: Current Methods and Some Proposals for Reform*, 68 MICH. L. REV. 926, 936 (1970); Comment, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 762 (1967).

extended full disclosure to virtually all consumer credit transactions in which significant extensions of credit are present, thereby affording the American consumer a meaningful basis not only for comparing transactions in which a finance charge is stated separately but also for comparing these transactions with other credit transactions in which no finance charge is stated. In each instance the Board has given the consumer the advantage of knowing the number, amounts and due dates of payments, as well as the total amount of payments owed. (12 C.F.R. § 226.8 (b)). Hence, the consumer can make an effective comparison between the cost of employing credit in cases in which a finance charge is separately stated and those in which it is not. Moreover, important information about credit insurance, balloon payments, the amounts of additional fees and charges, and the existence of security interests (12 C.F.R. § 226.8(b) and (c)), as well as two of the Act's major substantive protections, those relating to advertising (15 U.S.C. § 1661 et seq.) and rescission (15 U.S.C. § 1635), are assured for all consumers entering into credit transactions of significant duration rather than only for those consumers fortunate enough to deal with creditors making separate disclosure of finance charges.

It would be incredible if the first major piece of consumer credit legislation enacted by Congress could be avoided merely by a creditor's choice of including his credit costs within the price of his product rather than stating them separately.

"Neither the law, the Federal Reserve Board nor the courts are so simplistic as to believe that a person in the business of extending long term credit should be permitted in effect to abolish the Truth in Lending Act by merely charging a single 'cash or credit' price knowing full well that the great bulk of its customers

will never pay in less than, for example, thirty months." *Stroumpolos* v. *Premium Readers Service*, 362 F. Supp. 1100, 1103 (N.D. Ill., 1971)

For creditors doing a substantial portion of their business on a cash basis, burying the finance charge would presumably be discouraged by market pressures, but for the many creditors who do most or all of their business on credit the consequences of the decision whether to state or bury credit costs in the price become substantial. If the choice of burying credit costs in the price of the product gives them clear exemption from Truth in Lending, this choice will be increasingly easy to make. Governor J. L. Robertson showed the Board's concern about this danger when he said:

> "We believe that without this general provision [the more-than-four-installments rule] the practice of burying the finance charge in the cash price, a practice which already exists in many cases, would be encouraged to a great extent by Truth-in-Lending. In order to prevent this ironic result we felt it imperative to establish the more than four payments rule." CCH Consumer Credit Guide ¶ 30,228.

In 15 U.S.C. § 1604 Congress enjoined the Board "to effectuate the purposes of this [Act], to prevent circumvention thereof, or to facilitate compliance therewith" by such regulations as are "necessary or proper" to accomplish these results "in the judgment of the Board." The Board has exercised its judgment responsibly to effectuate the purposes of this Act and to prevent evasion thereof by adopting the more-than-four installments rule. In so providing the Board reached the same conclusion as to the need for credit disclosure as did the National Conference of Commissioners on Uniform State Laws which extended

the protections of its Uniform Consumer Credit Code (hereafter referred to as the UCCC) not only to transactions in which a finance charge was separately stated but also to those in which the agreement called for multiple installments. (UCCC §§ 2.104 and 3.104). If there is any doubt about the validity of the Board's more-than-four-installment rule, surely the interpretation of the agency designated by Congress to implement the Act, the Federal Reserve Board, should be given great deference by virtue of the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong" (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)) "particularly . . . when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

B. The Decision Below Introduces Such Uncertainty into the Law of Consumer Credit Disclosure as To Warrant Clarification at the Highest Judicial Level.

The decision below not only conflicts with a well-reasoned district court opinion, *Strempolos v. Premium Readers Service*, 336 F.Supp. 1100 (N.D. Ill. 1971),[1] which concluded that the multiple installment rule is a reasonable exercise of the Board's authority, but also with the provisions of the UCCC which were carefully prepared to mesh with the Act to afford consumers a uniform law of disclosure of credit terms.

[1] Now pending before the Seventh Circuit on Interlocutory Appeal, order dated November 17, 1971, Seventh Circuit Misc. Record No. 1202.

The UCCC was in preparation by the National Conference while Truth in Lending was being debated in Congress. The committees and staffs preparing these measures shared ideas in a cooperative effort to effect better consumer protection legislation. The Congressional purpose in promulgating Truth in Lending was to set federal standards for credit disclosure; if states met these standards, the Board was directed to exempt their laws from the Act and to allow state authorities to enforce their own disclosure laws. (15 U.S.C. § 1633). The disclosure provisions of the UCCC were carefully designed to meet the federal standards in order that states adopting the UCCC might qualify for exemption by the Board. UCCC §§ 2.104 and 3.104 define, respectively, consumer credit sales and consumer loans as those, *inter alia*, in which either a finance charge is made or the debt is paid in multiple installments. It is fair to say that a nation-wide uniform law of consumer credit disclosure was the shared objective of both the National Conference and the Congress, and in pursuance of this the UCCC contains the following provision designed to assure interstate creditors that they might operate uniformly in all states:

Section 2.301

. . .

(2) The seller shall disclose to the buyer to whom credit is extended with respect to a consumer credit sale the information required by either this Part, or the Federal Consumer Credit Protection Act.

(3) For the purposes of subsection (2), information which could otherwise be required pursuant to the Federal Consumer Credit Protection Act is sufficient even though the transaction is one of a class of credit transactions exempted from that Act pursuant to regu-

lation of the Board of Governors of the Federal Reserve System.

(Section 3.502 is similar for loans.)

Were the position of the Fifth Circuit in the court below sustained, the following undesirable consequences might follow:

(1) In UCCC states (currently Colorado, Idaho, Indiana, Oklahoma, Utah, and Wyoming), creditors not opting to state separately a finance charge may successfully contend that since they need not comply with Truth in Lending, the UCCC provision quoted above exempts them from having to comply with the disclosure provisions of the UCCC; hence, even in the UCCC states consumers would be denied the protection of disclosure legislation in the cases in which finance charges are buried.

(2) If the contention in (1) above is not sustained, there will be a different law of disclosure in UCCC states from that obtaining in states still governed by Truth in Lending. As a result pressure may be exerted in the UCCC states to amend the UCCC to make it conform to the Fifth Circuit's interpretation of Truth in Lending and thus to withdraw credit disclosure protection in transactions in which finance charges are not separately stated.

(3) States enacting the UCCC may no longer have laws considered substantially similar to Truth in Lending and may, therefore, not qualify for exemption pursuant to 15 U.S.C. § 1633.

C. The Decision Below Is an Erroneous Interpretation of the Act

The Board is ordered to carry out the purposes of the Act (15 U.S.C. § 1604) and this purpose is stated to be "to assure a meaningful disclosure of *credit terms* so that

the consumer will be able to compare more readily the various credit terms available and avoid the uninformed use of credit." (15 U.S.C. § 1601) (emphasis added). The Act defines "creditor" as referring to creditors who regularly extend or arrange "credit for which the payment of a finance charge is required...." (15 U.S.C. § 1602(f)). It is well known that some creditors choose to bury their finance charges in the price of their product. In order to deal with this practice, which probably bears most heavily on the low-income consumer, the Board, in pursuance of its authority to assure meaningful disclosure of credit terms and "to prevent circumvention or evasion" of the Act, provided in 12 C.F.R. § 226.2(k) that the Act applies not only to transactions in which the finance charge is separately stated but also in which there is an agreement that the debt be payable "in more than 4 installments."

The decision of the court below to the effect that the Board exceeded its powers in adopting the multiple installment rule is based on the court's belief that owing to the definition of creditor in 15 U.S.C. § 1602(f) only creditors making a separate statement of finance charges are covered. Strong policy considerations calling for full disclosure of credit terms in all significant extensions of credit militate against the decision of the court below. Moreover, internal evidence within Truth in Lending shows the court erred in construing the statute.

First, "finance charge" is defined as "the sum of all charges, payable *directly* or *indirectly* by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an *incident to the extension* of credit..." (15 U.S.C. § 1605(a)) (emphasis added). This all-inclusive definition hardly supports the Fifth Circuit's view that a creditor who buries his finance charge is not making a charge incident to the extension of credit.

Second, "credit sale" is defined as including:

"any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract." 15 U.S.C. § 1602(g).

The lease is the classic case in which no finance charge is separately stated; credit factors are commonly taken into consideration in fixing the rental payments. The definition of "credit sale" quoted above is largely based on Uniform Commercial Code Section 1-201(37) which determines when a lease is, in effect, a disguised sale and thus creates a security interest. It is worth noting that in the UCC cases in which leases were found to be disguised credit sales under UCC Section 1-201(37) no finance charges were separately stated.[2] If the Fifth Circuit's assumption that the Act applies only to transactions in which a finance charge is separately stated, the quoted definition of "credit sale" would be emasculated for it would limit the applicability of the Act in lease cases to a virtually nonexistent transaction —leases in which finance charges are separately stated.

Furthermore, the legislative history of Truth in Lending tends to refute the Fifth Circuit's narrow view of the meaning of finance charge as one which is separately stated. Several years of hearings on proposed Truth in Lending bills repeatedly pointed up the possibility that enactment

[2] See, e.g., *In re Walter W. Willis, Inc.*, 313 F. Supp. 1274 (N.D. Ohio 1970), *aff'd*, 440 F.2d 995 (6th Cir. 1971); *In re Oak Manufacturing, Inc.*, 6 UCC Rep. Serv. 1273 (S.D. N.Y. 1969); *Stanley v. Fabricators, Inc.*, 459 P.2d 467 (Alaska 1969); *United Rental Equipment Co. v. Ford & Callahan Contracting Co.*, 231 Md. 552, 191 A.2d 570 (1963).

of such legislation could induce some creditors, particularly those who rarely make cash sales, to pack the cost of credit into the price of their product.[4] It is significant that not until *after* these hearings was the language "payable directly or indirectly by the person to whom credit is extended" added to the definition of finance charge in the version of the bill that was finally enacted. 15 U.S.C. § 1605(a).

III. CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion of the Fifth Circuit.

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[4] *See Hearings on S. 750 Before the Subcommittee on Production and Stabilization of the Senate Committee on Banking and Currency*, 88th Cong., 1st & 2d Sess. (1963-1964), pp. 13, 208-209, 436-437, 500-501, 743, 744, 794, 1014-1015; *Hearings on S. 5 Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency*, 90th Cong., 1st Sess., pp. 377-380, 513, 514-515, 600, 604-606, 699, 700-701 (1967).